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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, ET AL.
Petitioners,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.
Respondents.

On Petition for Writ of Certiorari to the United States Court Of Appeals for the District of Columbia Circuit

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BRIEF FOR AMERICAN CONSULTING ENGINEERS COUNCIL AND CONSULTING ENGINEERS AND LAND SURVEYORS OF CALIFORNIA, *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

Counsel[1] for Petitioners and the Solicitor General on behalf of the federal Respondents have consented to the filing of this brief.[1] *Amici curiae*, the American Consulting Engineers Council ("ACEC") and

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[1] No counsel for a party authored any part of this brief and no one other than *amici curiae* made any monetary contribution to the preparation or submission of the brief.

Consulting Engineers and Land Surveyors of California ("CELSOC") are adversely affected by the decision below.

The ACEC is the largest national organization of consulting engineers, comprised of 52 state and regional member organizations representing more than 5,700 independent engineering firms throughout the United States. These firms employ more than 250,000 engineers, architects, land surveyors, scientists, technicians, and other professionals who design roughly $100 billion of private and public works annually.

The CELSOC is a statewide association of consulting engineers and land surveyors, comprised of 24 local chapters representing more than 1,000 consulting engineering and land surveying firms. The CELSOC is the largest member organization in the ACEC.

The ACEC and CELSOC seek to strengthen the business environment of member firms and enhance and expand market opportunities for those firms.

They are, therefore, concerned with any judicial decision that presents an important issue of federal law with significant practical consequences for land use. Here, the Court of Appeals has sanctioned broad application of the Endangered Species Act to species found only within a single state. Many members of the ACEC and CELSOC plan, design, and carry out

activities that would be regulated and perhaps prohibited by the Endangered Species Act as interpreted by the decision below. That decision, thus, adversely affects the number, scope, and costs of projects that provide work for the members of these organizations. Their interest in the Court's review and eventual reversal of the decision is therefore direct.

ARGUMENT

1. The question presented has recurring and wide-ranging importance.

The decision below has very serious consequences. Most immediately, prohibiting disturbance to the habitat of a purely local, non-migrating, insect significantly affects land use, whether by private owners or public authorities (as in the present case). Although the Delhi Sands Flower-Loving Fly involved here is confined to forty square miles in two California counties, the ruling necessarily condones like regulation of the habitat of any other endangered species, animal or plant, that is similarly localized. At present, we are told, there are more than 500 such species, distributed throughout the Nation.

The practical impact of the decision on land development is obvious enough. But, perhaps more relevant to this Court's disposition of the petition is the effect of the ruling on the constitutional balance between Federal and State powers. The Court of Appeals has approved regulation of local land use by a federal agency, invoking the interstate commerce

power, in a setting that involves no commercial activity and only the most tenuous interstate concerns. The rationale of the decision—so far as there is any common ground between the judges in the majority—is very open-ended, in no way confined to the Endangered Species Act ("ESA"). And its impact is especially great because the ruling emanates from the Court of Appeals for the District of Columbia, which effectively has a nation-wide jurisdiction in reviewing federal agency action.

2. **Review by this Court is urgently required.**

The several opinions in this case, producing no opinion of the Court and dividing as to the result, reflect the difficulty the Courts of Appeal are experiencing in defining the boundaries of federal power under the Commerce Clause. The petition fully documents the prevailing disarray (Pet. 6 - 15). Only this Court can definitively resolve the debate and the present case is a proper vehicle for so doing.

Of course, the call for intervention is especially appropriate in this instance because the stimulus of the debate in the lower courts is this Court's own recent decision in *United States v. Lopez*, 514 U.S. 549 (1995). Four years on, it is not clear to all whether that ruling is to be viewed as a "sport" in the law or, on the contrary, is a seminal milestone. Too often, *Lopez* has been distinguished away and the Court has remained mute. *But see*, Thomas, J., dissenting from the denial of cert. in *Cargill, Inc. v. United States*, 516 U.S. 955 (1995). If, as we suggest in a moment, the decision below conflicts

with *Lopez*, the Court ought to say so. The lower courts, the federal regulators, the Congress, the State legislatures, as well as affected private interests, are entitled to clarification as to the true meaning of *Lopez*. To further prolong the continuing debate over the limits of the Commerce Clause is unhealthy for our constitutional arrangements.

3. The decision below is erroneous, being in conflict with United States v. Lopez.

The obvious difficulty of tying to interstate commerce "harm" to a purely local endangered insect is reflected in the fractured decision below. Only two members of the three-judge panel could find any such tie, and they could not agree on a single rationale. In our submission, Judge Sentelle, in dissent, has convincingly answered the several claims of interstate commerce connection. Nevertheless, we briefly examine each of them, articulating additional objections.

(a) Means of "enabl[ing] the government to control the transport of the endangered species in interstate commerce." One judge below thought the prohibition of the taking of a localized endangered species could be justified on this theory. (Pet. App. 34a-38a). It is noted that the ESA prohibits "transporting and selling endangered species in interstate commerce" (Pet. App. 35a), and it is suggested that the ban on "taking" such a species is "a necessary aid." *Ibid.* One could perhaps accept this reasoning as applied to a species with commercial value that might be captured

with a view to its sale in interstate commerce. But there is no trade in the Delhi Sands Flower-Loving Fly, and the only "takings" that occur are killings, not captures. In *this* case, therefore, the prohibition on "takings" does not remotely assist the ban on interstate transactions.

Here, as elsewhere in the first opinion below, a basic flaw is the "lumping together" of all endangered species. The present case, however, does not challenge the "takings" provision of the ESA on its face, but only *as applied* to a species that neither migrates interstate nor is the subject of interstate commerce. The "cumulative impact" principle does not justify invoking the effect of taking *other* species on interstate commerce in weighing the constitutionality of the ban in suit. Congress cannot avoid Commerce Clause boundaries by casting an overwide net that includes *some* constitutional provisions or applications. The law struck down in *Lopez* would not have survived had it been merely one section of a broader gun control statute, most of which was valid.[2]

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[2] It may be, of course, that a *facial* challenge to a statute *as a whole* will fail if some parts of the law pass constitutional muster. But the present case is a limited attack, focused solely on the "take" provision of the ESA as applied to non-commercial sedentary species. The constitutional question, in this setting, is no different than if that discrete subject were addressed in a separate statute.

(b) "Prevent[ing] the channels of interstate commerce from being used for immoral or injurious purposes." The proposition that the Commerce Clause authorizes regulation with such an aim is, of course, well settled. But the application of that principle here is less than obvious, and, indeed, the opinion below invoking it does not explain its relevance to our case. (*See* Pet. App. 38a-40a). One can posit that removing an endangered species from its habitat is "immoral or injurious" and that prohibiting the capture of an endangered species for which there is an interstate market would help to keep the channels of interstate commerce pure. But, again, this rationale is wholly inapposite when, as here, there is no trade in the species, dead or alive.

(c) "Prevent[ing] the destruction of biodiversity." Unquestionably, protecting *any* endangered species from extinction helps to preserve the existing diversity of plant and animal life, and the value of that goal may be accepted. (*See* Pet. App. 49a-57a). But it simply does not follow that the threat to every endangered species has a "substantial effect" on interstate commerce. Here, the potential future of interstate commerce in the particular fly at issue is entirely conjectural and, one may add, unlikely. Once again, the claim advanced depends on a false aggregation of the impact of eliminating *all* endangered species, including those with existing commercial uses. (*See* Pet. App.54a-55a, n. 14). This is akin to sustaining the statute involved in *Lopez*, because *some other*

transactions in handguns would implicate interstate commerce.

(d) "Substantial effect on our ecosystem." Although rejecting Judge Wald's "biodiversity" argument as too conjectural, Judge Henderson posited a related, but grander, theory. It is summed up in the following sentence: "Given the interconnectedness of species and ecosystems, it is reasonable to conclude that the protection of a purely intrastate species (like the Dehli Sands Flower-Loving Fly) will therefore substantially affect land and objects that are involved in interstate commerce." (Pet. App. 70a). This is a breathtakingly wide proposition, which, despite a disclaimer (Pet. App. 72a, n. 6), has no logical stopping place and must therefore be rejected. It will not do to sustain Commerce Clause jurisdiction on the principle that, in some degree, everything is interconnected. This point was made long ago: "Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce." *Northern Securities Co. v. United States*, 193 U.S. 197, 402 (1904) (Holmes, J., dissenting). More importantly, it was forcibly re-iterated in *Lopez*. 514 U.S. at 564, 565, 567.

(e) "Prevent[ing] destructive interstate competition." Whatever its validity in a different context, this is not the place to invoke the proposition that the Commerce Clause authorizes Congress to enact (whether in the name of health, morality or environmental protection) uniform national standards for local enterprise so as to assure a "level playing

field" among the States in respect of their ability to compete in attracting out-of-state business or the ability of local industries to sell domestic products elsewhere. (Pet. App. 58a-65a). Once again, it must be stressed that the Delhi Sands Flower-Loving Fly has never been an article of interstate commerce. Moreover, even if our focus is widened to embrace *all* endangered species, the rationale fails since interstate commerce in them is banned in every case. To be sure, it may be that the unequal burdens on commerce in *other commodities* would result from endangered species regulation if there were no uniform national law. But there is no precedent for treating such a remote effect as sufficient. The theory has no limits, equally justifying federal fixing of local property tax rates and federal control of local schools, matters that doubtless affect of the State's competitive "attractiveness" to out-of-state business or prospective migrants.

(f) The effect of regulation on interstate commerce. The most novel justification for reaching the taking of the fly under the Commerce Clause is advanced by Judge Henderson's concurrence, in which she finds the necessary effect by noticing the impact of the regulation in this case. (*See* Pet. App. 70a-72a). This is a classic instance of putting the cart before the horse. The proper question is whether the activity sought to be regulated—here the "taking" of the fly—substantially affects interstate commerce, not whether *such regulation* would impact interstate commerce.

In sum, there is no viable rationale for a federal prohibition on harm to non-commercial isolated species under the Commerce Clause. The teaching of *Lopez* is that courts may not invoke a remote and tenuous link with interstate commerce by "pil[ing] inference upon inference" when no such connection is "visible to the naked eye." 514 U.S. at 563, 567. Especially is this so when the activity sought to be regulated is not inherently "economic activity" (*id.* at 560-561)[3] and is traditionally left to State regulation (*id.* at, 561 n.3, 564, 567, when the challenged federal law "contains no jurisdictional element that would ensure, through case-by-case inquiry," that the only activity regulated is one which actually affects interstate commerce (*id.* at 561), and when there are no relevant legislative findings purporting to discern a link with interstate commerce (*id.* at 563).[4] In each respect, the present case is like *Lopez* and ought to be decided accordingly.

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[3] Although the project that triggered this litigation, the proposed construction by the County of San Bernardino of a hospital and associated power station and traffic intersection, is not a private commercial venture, it can be characterized as "economic activity." But the ESA's prohibition on "harming" an endangered species equally applies to a homeowner tending his lawn.

[4]The Committee Reports cited by Judge Wald and Judge Henderson hardly qualify as legislative findings that harm to a sedentary and so-far-as-presently-known economically valueless species substantially affects interstate commerce. At best, the Reports reflect the view that such species

CONCLUSION

For the reasons stated here and in the Petition, certiorari should be granted.

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potentially may, at some future day, have some commercial use. *See* Pet. App.45a-48a, 69a.